Chicago-Kent Law Review

Volume 19 | Issue 4 Article 4

September 1941

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Chicago-Kent Law Review

CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS
Subscription price $2.00 per year Single copies, 75c Foreign subscription, $2.50

VOLUME 19 — SEPTEMBER, 1941 — NUMBER 4

DISCUSSION OF RECENT DECISIONS

CONTRACTS—ILLEGALITY—VALIDITY OF COVENANT LIMITING USE OF FILLING STATION PROPERTY GIVEN TO PROCURE FRONTAGE CONSENT.—In the case of *Lain* v. *Rennert*,[1] the defendant, Rennert, owned vacant property fronting on Catalpa Avenue in Chicago for a full block between Ashland Avenue and Clark Street. Rennert desired to use the east half of his property for an automobile filling station. To do so he was required by city ordinance[2] to obtain frontage consents from a majority of the owners within 150 feet of the proposed location of his filling station. The consent of the plaintiff, who owned the land facing Catalpa Avenue on the north side of that street, opposite the defendant's land, was solicited. To procure this consent, the defendant was asked to, and did give, a sealed covenant that the west half of defendant's land, not used for the filling station, would "be kept covered with grass, properly seeded and mowed, and at all times . . . kept in a good and sightly condition, and that the said covenant shall run with the land for a period of five years." This covenant was recorded. Thereafter defendant, Rennert, leased all of his described land to defendant, Piper, for a term of fifteen years, to be used by Piper to

[1] 308 Ill. App. 572, 32 N.E.(2d) 375 (1941).
[2] The Municipal Code of Chicago 1939, § 127-5.

operate a filling station to be built by Rennert on the east half of his land. The lease was made expressly subject to the covenant to the plaintiff. The plaintiff, within one year of the date of the giving of the covenant, filed suit for injunction and damages, claiming that the property covered by the covenant had not been covered with grass, but instead was covered with gravel and was being used as a parking lot. The trial court granted the relief prayed for.

The Appellate Court reversed this decision, holding, as should be expected, that although a seal in a deed makes inquiry into consideration unnecessary, an equity court may look beyond the seal and determine what the actual consideration was.[3]

It was found that in this case the easement granted by the deed was the consideration for which the plaintiff subsequently gave his frontage consent to the filling station. The court agreed with the defendant that this transaction was similar to a bargain and sale of a frontage consent and as such was against public policy. A sale of a frontage consent is held to be against public policy because it has the same result as a purchase of votes at a public election.[4] Moreover, since the owner acts in part in a public capacity, he cannot be allowed to make a profit from his action.[5]

The two precedents cited by the court[6] could, however, have been distinguished without great difficulty. Both were proceedings to invalidate licenses granted in reliance on frontage consents purchased for cash. The consideration having already been paid, there was no attempt to collect it. The fact that the consideration in the earlier cases was cash suggests an inquiry into the type of consideration which was existent in the instant case. No cash had been paid or promised. Perhaps failure to keep the covenant would have been a failure of consideration, and the consent would have become void. But this was apparently not contemplated by the parties and could only have resulted in invalidating the license without causing financial liability for breach. A breach could hardly cause a forfeiture of the consent in the absence of an expressed agreement, since conditions subsequent are frowned upon by the law.

Existence of a consideration of some kind may be admitted for the sake of argument, but it was certainly an unusual kind of consideration. It was not intended to be either financially profitable to the plaintiff himself or detrimental to the defendant but rather to be in the nature of protection to the residents of the neighborhood, including the defendant, against uses akin to nuisance which might lower the value of local real estate. It is submitted that there should be sufficient differentiation be-

3 Hale v. Dressen, 73 Minn. 277, 76 N.W. 31 (1898); Way v. Union Cent. Life Ins. Co., 61 S.C. 501, 39 S.E. 742 (1901); Williams v. Whittell, 69 App. Div. 340, 74 N.Y.S. 820 (1902); Lacey v. Hutchinson, 5 Ga. App. 865, 64 S.E. 105 (1909); Gates v. Herr, 102 Wash. 131, 172 P. 912 (1918); Hartford-Connecticut Trust Co. v. Divine, 97 Conn. 193, 116 A. 239 (1922); Branch v. Richmond Cold Storage, Inc., 146 Va. 680, 132 S.E. 848 (1926); Bandy v. Bandy, 187 S.C. 410, 197 S.E. 396 (1938).

4 Theurer v. People ex rel. Deneen, 211 Ill. 296, 71 N.E. 997 (1904).

5 People v. Griesbach, 211 Ill. 35, 71 N.E. 874 (1904).

6 Notes 4 and 5 supra.

tween personal financial gain at the expense of local real estate values and protection against the diminishing of those same real estate values to enable the courts to distinguish between the two situations and to rule differently thereon.

In view of the instant case and the precedents relied upon therein, it would seem that public policy requires a frontage consent to be an outright gift. A review of analogous situations raises a question of the wisdom of such a requirement. A state may grant franchises upon any terms not prohibited by its fundamental laws; it may even offer such franchises for sale.[7] It can likewise grant licenses and subsequently extend or modify them by special law[8] or by general statute.[9] A municipality may likewise impose conditions and restrictions upon a license.[10] As was said in *City of Hartford* v. *Connecticut Company*:

> The City, of course, could withhold its consent entirely. There can be no doubt therefore, of its right to withhold partially or to limit the grant.[11]

It may also impose conditions subsequent.[12] It may subsequently alter the terms of a franchise or a license already given.[13] A drainage district may likewise impose terms upon its consent to the use of the streets for a drainage ditch.[14] A liquor commission may also, subsequent to the grant of a license, further condition the grant upon the surrender of a key to the licensed premises for purposes of inspection.[15] Local authorities may not only accept conditionally, but even modify the plans proposed for street railways.[16]

It would thus seem that a gift need not always be unrestricted, and that a gift in part should not be deemed as a matter of law to be an unrestricted gift. The defendant in the instant case had by agreement received only a limited gift. Since he exceeded the limitations, it seems logical that he should respond in damages for so doing. With respect to damages suffered by the neighborhood generally, it would probably be more practical to prevent further damage by injunction than to attempt pecuniary recovery. The removal of the detrimental influence might substantially restore the property values to their original level.

In conclusion, it is submitted that the court has disregarded all question of a limited gift. Consideration for a frontage consent given merely for the protection of local property is quite different from cash payment

7 N.Y. Laws 1890, p. 1109, c. 565, § 93.
8 Jackson v. Revere Sugar Refinery, 247 Mass. 483, 142 N.E. 909 (1924).
9 Fogg v. Ocean City, 74 N.J.L. 362, 65 A. 885 (1907).
10 Van de Water v. Pridham, 33 Cal. App. 252, 164 P. 1136 (1917).
11 City of Hartford v. Connecticut Co., 107 Conn. 312, 140 A. 734 (1928).
12 In re Bickerstaff, 70 Cal. 35, 11 P. 393 (1886).
13 San Antonio Traction Co. v. Altgelt, 200 U.S. 304, 26 S.Ct. 261, 50 L. Ed. 491 (1906).
14 Van de Water v. Pridham, 33 Cal. App. 252, 164 P. 1136 (1917).
15 Manchester Press Club v. State Liquor Commission, 89 N.H. 442, 200 A. 407 (1938).
16 Conn. Public Acts of 1893, p. 308.

to an individual owner who, in effect, sells the right to damage his neighbor's property. Public policy should take cognizance of this difference.

CORPORATIONS—REPRESENTATIVE SUIT—INTERVENTION BY ONE NOT A STOCKHOLDER AT TIME OF TRANSACTION COMPLAINED OF. — In *Picca* v. *Sperry Corporation*,[1] the Federal District Court for the Southern District of New York, held that Rule 23(b)[2] of the Federal Rules of Civil Procedure, which requires in part that a stockholder bringing a representative action allege ownership of stock at the time of the transactions complained of, applied also to a stockholder seeking to intervene. In that action, one stockholder brought a representative action against the officers and directors for alleged wrongs to the corporation. The parties sought approval of a proposed settlement.[3] At the hearing, other stockholders opposing the settlement petitioned the court for leave to intervene on the ground that the plaintiff, who had indicated his willingness to settle, could not adequately protect their interests. The intervening petition did not comply with Rule 23(b). The court, observing that other stockholders might be able to meet the requirements of the rule, held it was not only applicable to petitioners but also governed the discretion vested in him by another rule,[4] and denied the petition.

It is undoubtedly true that a stockholder initiating a representative suit in the federal courts in addition to jurisdictional facts, such as diversity of citizenship and jurisdictional amount, must also show compliance with the rule in question.[5]

If he begins his proceeding in an appropriate state court, however, and if he possesses a right of action cognizable in the state court his

1 36 F. Supp. 1006 (1941). Not cited in the instant case, but illustrating parallel problems, are Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co., 200 F. 600 (1912); Guaranty Trust Co. v. Chicago, M. & St. P. Ry. Co., 15 F.(2d) 434 (1925).

2 U.S.C.A. following section 723c. Rule 23(b) provides as follows: "Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

3 The court denied approval of the proposed settlement, which had previously been approved by an arbitrator, because of doubt whether all the facts had been revealed to the court and whether the agreed set of facts upon which the arbitrator had approved the settlement was complete.

4 See footnote 16, infra.

5 Howes v. City of Oakland, 104 U.S. 450, 26 L.Ed. 827 (1881); Summers v. Hearst, 23 F. Supp. 986 (1938).

suit ought not to be dismissed for his inability to comply with the rule in question when the case is subsequently removed to some federal court at the instance of the defendants.[6] As to him, the rule is inoperative. Whether or not the same principles should govern one seeking to intervene depends upon whether Rule 23(b) is jurisdictional, substantive, or procedural. Unlike an initial plaintiff, an intervenor in a representative action need not allege independent federal jurisdictional grounds.[7] The United States Supreme Court has held that the allegation of stock ownership at the time of the transactions complained of is not a jurisdictional requirement.[8]

The fact that the initial plaintiff utilized the federal rather than the state courts would change the rights of the person seeking to intervene if Rule 23(b) establishes substantive rights. Under the language of the rule one would not be entitled to assert any claim unless his ownership existed at the time the alleged wrongs were committed. The holder of subsequently acquired shares could neither initiate action, nor justifiably ask permission to join in a pending suit. So far as the state courts are concerned, the rulings vary. In some states a stockholder may intervene regardless of when he acquired holdings. (In this category is the State of New York, where the corporation involved in the instant proceeding was organised.[9]) In other states, a stockholder has no such right.[10] It would seem, according to *Erie Railroad Company* v. *Tompkins*,[11] that the substantive rights of a stockholder in a domestic corporation should be no broader in the federal courts than in a state court. If Rule 23(b)

[6] Earle v. Seattle, 1 S.&E. Ry., 56 F. 909 (Washington 1893); Evans v. Union Pacific Ry. Co., 58 F. 497 (Colorado 1893); See, however, Venner v. Great Northern Ry. Co., 209 U.S. 24, 28 S.Ct. 328, 52 L.Ed. 666 (1908) in which a stockholder's action, begun in a state court and removed to a federal court at the instance of the defendants, was dismissed for failure of plantiff to allege ownership of stock at the time of the transactions complained of and to meet the other requirements now contained in Rule 23(b) (footnote 2, supra). The ruling of the lower federal court dismissing the action was not raised on appeal. The Supreme Court merely held that the lower court had jurisdiction to hear the case. See also: Jacobson v. General Motors Corp., 22 F. Supp. 255 (New York 1938), and Hand v. Kansas City Southern Ry. Co., 55 F.(2d) 712 (New York 1931). In the latter case, it is said with respect to actions removed to the federal courts, (p. 714): ". . . that a stockholder must have been such at the time of the commission of the wrongs complained of and that the suit is not collusive, has no application to cases depending upon a federal question. It applies only to cases where jurisdiction is based upon diversity of citizenship."

[7] Stewart v. Dunham, 115 U.S. 61, 5 S.Ct. 1163, 29 L.Ed. 329 (1885); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921).

[8] Illinois Central Railroad Company v. Adams, 180 U.S. 28, 21 S.Ct. 251, 45 L.Ed. 410 (1901); Venner v. Great Northern Railway Company, footnote 6 supra; Hand v. Kansas City Southern Railway Company, footnote 6 supra; Ainscow v. Sanitary Co. of America, Del. Ch., 180 A. 614 (1935).

[9] Pollitz v. Gould, 202 N.Y. 11, 94 N.E. 1088, 38 L.R.A. (N.S.) 988, Ann. Cas. 1912D 1098 (1911). Also in this category are: Alabama, Idaho, Illinois, Maine, Michigan, Montana, and New Hampshire—14 C.J. 936.

[10] Colorado, Georgia, Indiana, Iowa, and Pennsylvania cases are cited in 14 C.J. 937, footnote 58.

[11] 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

is substantive, it indicates that the stockholders rights should be more narrowly construed in the federal courts than in the state court.

The present rule embodies the language of two former equity rules,[12] which in turn codified the effect of the decision in *Hawes* v. *Oakland*.[13] Rule 23(b) can be only a rule of procedure regulating the manner of utilizing the federal judicial machinery because the sole authority for it rests in the grant of power to the United States Supreme Court to adopt rules regulating procedure. This power contains the express prohibition that: "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[14] When one remembers that the original purpose of the rule was to prevent collusive suits by making inoperative a transfer of stock to a non-resident solely for the purpose of enabling him to comply with jurisdictional requirements, it becomes fairly apparent that the rule was intended as a mere procedural device.[15] Its application in the instant proceeding elevates it into a rule of substance in apparent disregard of the express prohibition above referred to.

The court in the instant case apparently thought that the right of intervention was subject to judicial discretion under Rule 24(b).[16] The reason assigned for seeking to intervene was the inability of the initial plaintiff adequately to represent the other members of the class. It is submitted that this reason comes clearly within Rule 24(a), clause 2, justifying intervention as a matter of right.[17] It is likely that the holding in the instant case will not be reviewed for some time. Meanwhile other federal district courts would be warranted in scrutinising the problem carefully before following the ruling of the New York Federal court.

R. K. MERRILL

INJUNCTIONS—MEANING OF THE TERM "LABOR DISPUTE"—NECESSITY OF RELATIONSHIP OF FUNCTIONAL EMPLOYMENT.—Opera on Tour, Inc., is engaged in the business of presenting public performances of grand opera at popular prices. Musicians are not, and never have been, employed by the opera company, its music being mechanically reproduced from

12 Equity Rule 94 was promulgated in 1882. It was replaced by Equity Rule 27 in 1912, which varied slightly from Equity Rule 94. Rule 23(b) now in force contains all the requirements of these equity rules. (See footnote 2 supra). It was adopted as a rule of civil procedure for the District Courts of the United States pursuant to Act of June 19, 1934, Ch. 651, 48 Stat. 1064, effective September 16, 1938. See 4 Md. L.R. 380.

13 104 U.S. 450, 26 L.Ed. 827 (1881). 14 28 U.S.C.A. Sec. 723(b).

15 Hawes v. Oakland, footnote 13 supra; 21 Har. L.R. 195.

16 28 U.S.C.A. following section 723(c): "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

17 28 U.S.C.A. following section 723(c): "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

records, but the employment of stagehands is necessary to the conduct of such business. The Muscians' Union, determined to compel the opera company to abandon the use of mechanical devices which causes unemployment of its members, seized upon an alliance with the Stagehands' Union,[1] and induced the latter union to order its members to cease rendering services to the opera company. The company sued to restrain the two unions from directing or inducing stagehands to cease rendering services to it. The New York Court of Appeals held that the anti-injunction act[2] does not apply where the demands of labor are not generated by some interest connected with "employment,"[3] and that under such circumstances it is not a lawful labor objective "for a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional apportunity of employment."[4] The issuance of an injunction was affirmed.[5]

The decision is based on the fundamental assumption that it is not every interest of labor which can serve as a foundation for a "labor dis-

1 Both unions are members of the American Federation of Labor. They had agreed that they might call upon one another for "moral support" in certain specified contingencies, and that in some cases co-operation might go beyond "moral support."

2 N.Y. Civil Practice Act, Section 876-a, denying jurisdiction to issue "any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute." Sub-section 10(c) defines the term "labor dispute" as follows: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee."

3 Opera On Tour, Inc. v. Weber, 34 N.E.(2d) 349 (N.Y., 1941).

4 Ibid., p. 353. The theory being that such a demand "has no reasonable connection with wages, hours, health, safety, the right of collective bargaining, or any other condition of employment or for the protection of labor from abuses," (p. 352) and is therefore unjustified.

5 Reversing 258 App. Div. 516, 17 N.Y.S.(2d) 144 (1940) and affirming 170 Misc. 272, 10 N.Y.S.(2d) 83 (1939). "The Musicians' Union, 'its officers, members, agents, servants, employees, representatives and attorneys' and the Stagehands' Union and its 'officers, *members*, agents, servants, employees, representatives and attorneys' have been permanently enjoined and restrained, among other things, 'from interfering with plaintiff's employees and from directing, ordering, instructing or advising any person or persons to cease performing or not to perform services for the plaintiff, Opera On Tour, Inc., and from inducing, causing or procuring in any manner or by any device whatsover, any person or persons or organization, association, corporation or group of which any of plaintiff's employees may be a member or may be affiliated with or any group or groups of plaintiff's employees to leave or not to enter the plaintiff's employ or to cease performing services for plaintiff or to cause or induce its members or others to leave or not to enter the plaintiff's employ or to cease performing services for the plaintiff on the ground that, or for the reason that, the plaintiff, Opera On Tour, Inc., uses recorded or transcribed or mechanically reproduced music in connection with its performances' . . . "(Italics Supplied). It is submitted that the court's insistance that "there is in the case at bar no denial of the right to strike" cannot be taken at face value.

pute"; that only those interests springing from a somewhere existent relationship of employment, with which the parties to an economic dispute are in some way connected, can lie behind a "labor dispute."[6] Although it has not been universally accepted,[7] the theory seems sound enough.[8] The employment relationship has created the problems which have led society to grant to one party certain weapons which it ordinarily would not have obtained; remove the relationship, or some connection therewith, and it should follow that such weapons be withdrawn. The New York court has heretofore taken this approach in the "one-man business" cases,[9] but the instant case sets up a new line of demarcation based on a functional, "type of business" test, inasmuch as the actual employment of stagehands must be explained away.

The stagehands may lawfully picket the place of business of one who employs stagehands in order to compel the employment of more stagehands;[10] and, in order to obtain recognition as bargaining agent, the stagehands' union may picket such an employer, notwithstanding the fact that his employees are not members of the union and that they are satisfied with their employment relations.[11] A carpenters' union, in its efforts to secure a closed shop in a lumber mill, may lawfully refuse to

6 Thompson v. Boekhout, 273 N.Y. 390, 7 N.E. (2d) 674 (1937); Wohl v. Bakery and Pastry Drivers and Helpers, 284 N.Y. 784, 31 N.E.(2d) 765 (1940); Luft v. Flove, 270 N.Y. 640, 1 N.E. (2d) 369 (1936).

7 Senn v. Tile Layers Protective Union, 222 Wis. 383, 268 N.W. 270 (1936); Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 91 (1940); Rohde v. Dighton, 27 F. Supp. 149 (1939).

8 It is difficult to conceive of labor law, "labor disputes" and anti-injunction statutes in a society which does not know the employment relationship.

9 E.g. Where the plaintiff employs no one and is not in "unity of interest" with persons who do employ. Thompson v. Boekhout, 273 N.Y. 390, 7 N.E.(2d) 674 (1937); Wohl v. Bakery and Pastry Drivers and Helpers, 284 N.Y. 784, 31 N.E.(2d) 765 (1940); Luft v. Flove, 270 N.Y. 640, 1 N.E.(2d) 369 (1936). Compare foregoing with Baillis v. Fuchs, 283 N.Y. 133, 27 N.E.(2d) 812 (1940), where there was a willingness to re-employ upon pre-strike terms; and Boro Park Sanitary Live Poultry Market, Inc. v. Heller, 280 N.Y. 481, 21 N.E.(2d) 687 (1939), where the corporate entity theory operated to furnish the employment relationship.

10 J.H.&S. Theatres, Inc. v. Fay, 260 N.Y. 315, 183 N.E. 509 (1932). Also see Scott-Stafford Opera House Co. v. Mineaoplis Musician's Ass'n, 118 Minn. 410, 136 N.W. 1092 (1912). Cf. Haverhill Strand Theater v. Gillen, 229 Mass. 413, 118 N.E. 671 (1918). It does not follow that they could lawfully insist upon the employment of more workmen of just any character. Take, for example, the case of musicians, employed by a radio studio, insisting upon the employment of stagehands in the studio. Sometimes stagehands and musicians are fellow workmen engaged in the same trade; sometimes they are not. The instant case lays the test on a functional basis, indicating that labor canot lawfully demand that an employer change the very nature of his business. If the Illinois court had left its decision in Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union of Chicago, 371 Ill. 377, 21 N.E.(2d) 308 (1939), to stand for this proposition it could have avoided turning, in Swing v. American Federation of Labor, 372 Ill. 91, 22 N.E.(2d) 857 (1939), to the employer-employee test.

11 May's Furs and Ready to Wear, Inc. v. Bauer, 282 N.Y. 331, 26 N.E.(2d) 279 (1940); Stillwell Theatre v. Kaplan, 259 N.Y. 405, 182 N.E. 63 (1932). In these cases the unions' demands related to the employment of workmen who performed functions required by the nature of the employer's business.

allow its members to work for contractors who use the non-union product of such mill,[12] and where a manufacturer refuses to unionize his plant the union may peacefully picket at the retail outlet in order to persuade the consumer not to purchase the non-union product.[13] In all of these cases the labor activity complained of was being conducted by workmen in a given trade or industry against an employer whose business called for the employment of such workmen, or against one in unity of interest with the employer. It can hardly be thought that the legislature intended to permit labor unions to compel an employer to abandon one business and enter another. Once it is agreed that conducting opera sans musicians is one type of business while operating with musicians is another[14] it would seem clear that the instant case is sound, for when viewed in the functional aspect it does not stand for the proposition that it is inevitably an unlawful labor objective "for a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity of employment."[15]

D. S. MORRIS

LANDLORD AND TENANT—LEASES AND AGREEMENTS—WHETHER EXPRESSLY BASING RENTAL ON A PERCENTAGE OF SALES MADE FROM THE LEASED PROPERTY RAISES AN IMPLIED COVENANT NOT TO DIVERT SUCH SALES TO OTHER LAND.—"What is implied in an express contract is as much a part of it as what is expressed."[1] Interesting on this point is *Seggebruch* v. *Stosor*[2] recently decided by the Appellate Court of Illinois. The defendant

[12] Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917). Here, not only does the nature of the contractor's business call for the employment of carpenters, but the contractor is in unity of interest with one who is engaged in a dispute arising out of the employment of carpenters. Cf. Auburn Draying Co. v. Wardell, 227 N.Y. 1, 124 N.E. 97 (1919), where threatened action, by crafts different from that to which the workers of the objectionable employer belonged, was held to be unlawful—thus breaking the ground for the development of the principle underlying the instant case that workmen cannot justify interference with business on the sole ground that those they seek to aid are also workmen. It appears that assistance may only go to those engaged in the same trade or industry and that the functional nature of the employer's business will determine whether the common color exists.

[13] Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.(2d) 910 (1937), where the retailer is in unity of interest with one whose business requires an employment relation with the type of workmen who are protesting.

[14] That it is, note the difference in admission price, with the consequent difference in class and number of patrons, and the type of community in which produced; but the true distinction is functional, bearing some analogy to a comparison of the motion picture with the legitimate stage.

[15] As indicated by the court at page 354: "There is in the case at bar no question raised concerning the dismissal of any employee on account of the introduction of machinery." If unions may strike against men [National Protective Ass'n of Steam Fitters and Helpers v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902)], it should follow that they may strike against machines, so long as the functional test is met. Barr v. Essex Trades Council, 53 N.J. Eq. 101, 30 A. 881 (1894); Bayer v. Brotherhood of Painters, 108 N.J. Eq. 257, 154 A. 759 (1931). Cf. Hopkins v. Oxley Stave Co., 83 F. 912 (1897).

[1] Bishop on Contracts (2d Ed.) 95, § 241 (1907).

[2] 309 Ill. App. 385, 33 N.E.(2d) 159 (1941).

here rented a gasoline station from the plaintiff at a rental based on a percentage of the gross sales. While the lease was still in force the defendant acquired a lot adjoining the plaintiff's and erected another gasoline station on it. The amount of the gasoline sold upon the plaintiff's property diminished until the rent was reduced to a nominal sum. The plaintiff brought suit to recover a reasonable rental for the premises and to have the lease set aside. The trial court granted the relief asked for and the Appellate Court affirmed its decree. In effect, the court said that while there was no express promise in the lease, nevertheless it was clearly implied that defendant was to use reasonable diligence in operating plaintiff's station.

A case exactly in point is *Cissna Loan Company* v. *Baron.*[3] Here the plaintiff operated a department store business in his own building. The defendant bought the business and leased the building from the plaintiff. The rent was to be based upon a percentage of the gross sales. The defendant operated the business for some time and paid the rent as agreed in the lease. One day the defendant moved two large departments from the plaintiff's building into an adjoining store. Plaintiff brought suit claiming that the sales made next door should be included in the computation of rent owed to the plaintiff. The court held that the defendant, having no right to move the two departments into an adjoining building, must include the receipts from these departments in the computation of gross sales.

Other cases on this point are *Selber Bros.* v. *Newstadt's Shoe Stores;*[4] *Spring Brook Ry. Company* v. *Lehigh Coal and Navigation Company;*[5] *Sinclair Refining Company* v. *Davis.*[6]

It is clear that there is not much controversy concerning this point. All the cases are in accord in holding that the law, a silent factor in every contract, will not allow one to break implied covenants.[7]

This is the first time that a case involving a filling station lease has arisen on this point in Illinois. However, the Illinois Supreme Court has consistently held that, where rent is to be based on a percentage of the income from the property leased, the lessee is bound to use reasonable diligence in his use of the property so as to obtain the most revenue for himself and for his lessor.[8]

There can be no doubt that the rights of the lessor demand that the lessee be precluded from wilfully injuring the lessor. If an implied covenant were not read into the written contract, the lessee might be without a remedy, and the lessor would be able to continue his unconscionable conduct unhindered. Such a result would be contrary to established principles of justice.

The equities in favor of the lessor in the case at hand are stronger

[3] 149 Wash. 386, 270 P. 1022 (1928).
[4] 194 La. 654, 194 So. 579 (1940).
[5] 182 Pa. 500, 37 A. 525 (1897).
[6] 47 Ga. App. 601, 171 S.E. 150 (1933).
[7] Long v. Straus, 107 Ind. 94, 95, 6 N.E. 123, 7 N.E. 763, 57 Am. Rep. 87 (1886).
[8] Daughetee v. Ohio Oil Co., 263 Ill. 518, 105 N.E. 308 (1914); Stoddard v. Ill. Imp. & Ballast Co., 275 Ill. 199, 113 N.E. 913 (1916).

than those of the lessor in the Cissna Case. In the Cissna Case, the lessee was forced to move two of the departments because he needed the space for an office. Nevertheless, the Court held him liable because the implied covenant in the lease forbade such actions regardless of necessity. In the instant case the trial judge characterized the lessee's actions as "wilful and deliberate and done purely with the intention of injuring the lessor."[9] As the trial judge said in the Stosor case, the law will not allow such an evident wrong to be committed without finding some remedy. D. RYAN

MINES AND MINERALS — CONVEYANCES — MEANING OF WORDS "SURFACE ONLY."—In *Shell Oil Co., Inc.* v. *Manley Oil Corporation*,[1] complainant was an assignee of an oil and gas lease given by persons claiming title through the grantor in a certain warranty deed to the minerals underlying the land, other than coal. The warranty deed upon which the assignee's right depended purported to convey the "surface only" and such deed was expressly made subject to a prior deed conveying coal rights. Defendant, on the other hand, claimed a right to drill under an oil and gas lease derived under the grantee in the warranty deed, on the theory that the warranty deed passed to the grantee not only the bare surface of the land but also all minerals underlying the land other than coal. Complainant brought a bill to enjoin the defendant from drilling for oil and gas, relying on the contention that the words "surface only" meant only the superficial part of land, exclusive of minerals, and that an estate in fee to all minerals, other than coal, remained in the grantor.

The District Court, Eastern District Illinois, denied injunction, holding that under Illinois law, a deed which purported to convey the "surface only" of land, and which was expressly made subject to a prior deed conveying coal rights, was construable under the evidence as a complete grant of the estate and rights of the grantor including all mineral rights other than the coal rights.[2] The words "surface only," as used in

9 309 Ill. App. 385, 33 N.E.(2d) 159 (1941).

1 37 F. Supp. 289 (1941).

2 Relying principally upon Ramage v. South Penn Oil Co., 94 W.Va. 81, 118 S.E. 162, 31 A.L.R. 1509 (1923) wherein "all that surface of a tract" subject to a right of ingress and egress for drilling oil and gas wells thereon was held to convey not only the surface but also all minerals other than oil and gas. The Ramage case, supra, overruled Williams v. South Penn Oil Co., 52 W.Va. 181, 43 S.E. 214 (1903) which held that ". . . the word 'surface' has a definite certain meaning; . . . it is that portion of the land which is or may be used for agricultural purposes, . . ." See also: Bogart v. Amanda Consolidated Gold Mining Co., 32 Colo. 32, 74 P. 882 (1903); Myher v. Myher, 224 Mo. 631, 123 S.W. 806 (1909). Also the case of Gearhart v. McAlester Fuel Co., 199 Ark. 981, 136 S.W.(2d) 679 (1940) held that ". . . the word 'surface', as used in the conveyances above mentioned, means something more than that portion of the land which is or may be used for agricultural purposes. It means not only the actual top of the ground, but also all the earth substructure, except the coal therein, the right to mine and recover which was granted in the lease." For a discussion of the term "surface" as used in transfers of land see 31 A.L.R. 1530.

the warranty deed in question, presented an ambiguity in view of the fact that the grant was made subject to a prior deed of the underlying coal, leaving in doubt whether the grantor wished to dispose of the remainder of his interest in the property, or merely to pass the top soil, retaining all sub-surface rights other than the right to mine coal. Evidence, therefore, was admitted of a custom[3] in Franklin County, extant at the time of making the deed in the instant case and prior to the discovery of oil, whereby the words "surface only" were used in transfers of land already subject to prior grants of coal rights where the intention was to pass title to all minerals underlying the land other than coal. Such proof of custom was relied on to show a similar intention on the part of the grantor in the instant case. The court in reaching its decision relied upon the rule that ambiguity in a deed should be resolved most strongly against the grantor and in favor of the grantee.[4]

The term "surface," when used as the subject of a conveyance, is not a rigid one, capable of a definition of universal application, but is susceptible of limitation according to the intention of the parties using it.[5] The use of the additional word "only" following the word "surface" in the deed provides only further criteria in arriving at that intention, and when coupled with the evidence of the custom, tends to bear out the interpretation given to the grant. Particularly is this so where the grantor, to prevent a breach of warranty, placed a specific provision in the deed subjecting the same to the earlier grant of coal rights. Such provision should be treated as excluding the possibility of any other reservation having been made.

The decision should not affect the principle, well established in Illinois, that each specific mineral underlying land may be severed from the remainder of the land and conveyed or reserved as a separate estate in fee where such is accomplished by clear and unambiguous language in the conveyance,[6] but it does serve as a warning that a grantor, under similar circumstances, desiring to reserve specific minerals, should use express language to accomplish his purpose.

A. W. FORBES

MORTGAGES — REDEMPTION — WHETHER JUNIOR MORTGAGEE FRAUDULENTLY OMITTED FROM THE FIRST MORTGAGE FORECLOSURE PROCEEDINGS MAY REDEEM AFTER REDEMPTION PERIOD HAS EXPIRED BY PAYING THE AMOUNT OF THE SUCCESSFUL BID.—The element of fraud has caused the Illinois Supreme Court, in *Callner* v. *Greenberg*,[1] to elaborate upon the traditional distinction between equitable redemption and statutory redemption. In a foreclosure proceeding by a senior mortgagee, the junior mortgagee

3 Where language used in a deed is ambiguous, extrinsic evidence is admissible to show the intention of the parties.

4 Tiffany, Real Property (3rd Ed.) § 978, cases cited therein.

5 See footnote 2.

6 Kinder v. LaSalle County Coal Co., 301 Ill. 362, 133 N.E. 772 (1921); Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N.E. 144 (1898).

1 376 Ill. 212, 33 N.E.(2d) 437 (1941).

was made a party as an "unknown owner," although his name and address were known, and service of summons was had by publication only. At the ensuing foreclosure sale in 1933, the property, security for a debt of $50,000, was sold for $8,500. The junior mortgagee, learning of these proceedings in 1937, shortly thereafter filed suit to redeem, tendering the $8,500 bid at the sale, plus interest. A motion to dismiss for want of equity was sustained by the trial court. The Appellate Court affirmed,[2] applying the maxim that, "he who seeks equity must do equity," and indicated that, in order to redeem in equity, the junior mortgagee must tender the full amount of the first mortgage debt. The Illinois Supreme Court, however, reversed and remanded with directions to overrule the motion, deciding that the junior mortgagee was, under these circumstances, entitled to statutory redemption, i.e., to redeem by tendering the amount bid at the sale; also holding that to require the junior mortgagee to pay the full amount of the senior mortgage would be to permit the parties guilty of fraud to force an election most beneficial to their interests.

Equitable redemption and statutory redemption are fundamentally different. A junior mortgagee has an absolute right to redeem, founded upon equitable principles and independent of statute,[3] even if he has not been made a party or has been improperly made a party to the senior foreclosure proceedings. When so doing, however, he must pay the full amount secured by the senior mortgagee.[4] The right of statutory redemption,[5] although it usually can be exercised only within the periods of time and in the manner prescribed by the statute, requires a junior mortgagee to tender only the amount bid at the senior mortgage fore-

[2] 304 Ill. App. 501, 26 N.E.(2d) 675 (1940).

[3] Steinkemeyer v. Gillespie, 82 Ill. 253 (1876); Wiley, Banks & Co. v. Ewing, 47 Ala. 418 (1872); Frink v. Murphy, 21 Cal. 108, 81 Am. Dec. 149 (1862); Goodman v. White, 26 Conn. 317 (1857); Anson v. Anson, 20 Iowa 55, 89 Am. Dec. 514 (1865); Johnson v. Hosford, 110 Ind. 572, 10 N.E. 407 (1887); J. I. Case Threshing Mach. Co. v. Mitchell, 74 Mich. 679, 42 N.W. 151 (1889); Cassidy v. Wallace, 102 Mo. 575, 15 S.W. 138 (1891); Cram v. Cottrell, 48 Neb. 646, 67 N.W. 452, 58 Am. St. Rep. 714 (1896); Moulton v. Cornish, 138 N.Y. 133, 33 N.E. 842, 20 L.R.A. 370 (1893); Horr v. Herrington, 22 Okla. 590, 98 P. 443, 132 Am. St. Rep. 648, 20 L.R.A. (N.S.) 47 (1908); Hoppin v. Doty, 22 Wis. 621 (1868); Black v. Manhattan Trust Co., 213 F. 692 (1914).

[4] A person who is entitled to redeem from the sale under foreclosure, to which he was not a party, must pay the full amount of the mortgage lien, though the land may have sold for a less sum. Dougherty v. Kubat, 67 Neb. 269, 93 N.W. 317 (1903). There being a clear distinction between a statutory redemption which is from the sale and not from the mortgage and an equitable redemption established by the court, in which case the redemption is from the mortgage, the redemptioner in the latter case must follow the technical rules of equity and pay all that is due under the mortgage, before he is entitled to redeem and receive a conveyance of the property. Machold v. Farman, 20 Idaho 80, 117 P. 408 (1911). Where statutory right of redemption was waived, purchaser at junior mortgage foreclosure seeking redemption in equity from senior mortgagee was required to tender or pay whole mortgage debt. Smith v. Simpson, 129 Ark. 275, 195 S.W. 1067 (1917).

[5] Ill. Rev. Stat., 1939, Ch. 77, §§ 18, 20.

closure sale.[6] These two methods have long been recognized to be law in Illinois.[7]

The court, in the case at hand, allows statutory redemption on the ground that fraud was practiced upon the junior mortgagee by the filing of an affidavit falsely alleging that the holder of such mortgage was unknown. It was regarded as fraud because ". . . the holder of a junior mortgage has substantially different rights when he is a party to the foreclosure of a senior mortgage and when he is not. In the one instance he may redeem for the amount bid at the sale; in the other he is required to pay the full amount of the first mortgage."[8] Whether one not a party to the foreclosure proceeding has a right of statutory redemption within the prescribed period is a question upon which the Illinois law is not entirely clear. The point has never been directly raised, although *Heinroth* v. *Frost*[9] held that a junior mortgagee's right to redeem within the statutory period, under section 18 or section 20 of the chapter on

[6] A junior mortgagee who is a party to a suit to foreclose a senior mortgage may redeem from a foreclosure sale by paying the amount for which the property was sold, even though less than the amount of the senior mortgage. Froelich v. Swafford, 33 S.D. 142, 144 N.W. 925 (1914).

[7] "When the owners of the equity of redemption come into court and seek to redeem, the application is not only in form but in substance, to redeem from the mortgage and not from the sale under the mortgage. They are bound by the mortgage and not by the sale, to which they were strangers, by reason of their not having been made parties to the proceedings of foreclosure." Bradley v. Snyder, 14 Ill. 263, 266 (1853).

"In that case [Bradley v. Snyder], certain grantees of the mortgaged premises who were not made parties to the bill of foreclosure, filed a bill to redeem on payment of the amount bid at the sale. They were required first to do equity, and discharge the prior mortgage debt. They were not exercising a strictly statutory right." Seligman v. Laubheimer, 58 Ill. 124, 126 (1871).

"The distinction must be kept in mind between a statutory redemption, which is from the sale and not from the mortgage, and the equitable redemption established by the courts, in which the redemption is from the mortgage and not from any sale, and out of which springs the rule that the redemptor must do equity and pay all that is due under the mortgage, which may exceed the amount of the sale, and which may, in some cases, include not only the debt and interest, but taxes, repairs and betterments made and paid by a mortgagee who has entered for condition broken (2 Jones on Mortgages [4th ed.] § 1115), and in reduction of which such mortgagee in possession may, in most cases, be required to account for rents and profits of the premises actually received or that could have been received by the exercise of reasonable care and diligence." Rodman v. Quick, 211 Ill. 546, 554, 71 N.E. 1087, 1090 (1904).

"The right of redemption from sale on judgment or decree of foreclosure is purely statutory, and it cannot be exercised except within the periods of time and in the manner substantially as pointed out in the statute." Chicago Savings Bank v. Coleman, 283 Ill. 611, 613, 119 N.E. 587, 588 (1918). See also: Hyman v. Bogue, 135 Ill. 9, 26 N.E. 40 (1890); Ogle v. Koerner, 140 Ill. 170, 29 N.E. 563 (1892); Morgan v. Carson, 214 Ill. App. 569 (1919); Hamalle v. Kimmel, 224 Ill. App. 9 (1922); Odell v. Levy, 307 Ill. 277, 138 N.E. 608 (1923); Hall v. American Bankers' Ins. Co., 315 Ill. 252, 146 N.E. 137 (1925); Schaefer v. Dippel, 250 Ill. App. 184 (1928); Mulholland v. Landise, 284 Ill. App. 237, 1 N.E.(2d) 255 (1936); Smith v. Toman, 368 Ill. 414, 14 N.E.(2d) 478 (1938).

[8] Callner v. Greenberg, 376 Ill. 212, 216, 33 N.E.(2d) 437, 439 (1941).

[9] 250 Ill. 102, 95 N.E. 65 (1911).

judgments[10] was unaffected by the fact that he was made a party to the senior mortgage foreclosure as "unknown owner." This situation parallels that in the instant case.

The authorities relied upon in the instant case do not support the position taken,[11] moreover, the language of the statute would indicate a contrary intention,[12] recognizing as it does a right in the junior mortgagee to effect a statutory redemption whether he is made a party or not. In addition, all the Illinois cases cited by the court, permitting a statutory redemption after the expiration of the statutory period, differ from the instant case in two ways: First, the plaintiffs were parties to, and were bound by, the foreclosure proceeding, and hence, unless they were granted relief against fraud by permitting redemption after the expiration of the statutory period, their interests in the premises would be lost forever; and second, in each case the plaintiffs relied upon representations of the purchaser at the foreclosure sale that redemption could be made after the expiration of the statutory period.[13] Further,

10 Footnote 5, supra.

11 Rodman v. Quick, 211 Ill. 546, 71 N.E. 1087 (1904) contains no language supporting the principal case. No notice of foreclosure was given to the plaintiff and he filed a bill to redeem. The court simply drew the distinction between statutory and equitable redemption and held that the plaintiff should pay the amount of the debt in order to redeem. See footnote 7, supra. In a case where the facts were similar except that the party who was left out was the grantee of the mortgagor, the instant court apparently relied upon the following language: "Although the grantee of the mortgagor, who is not a party, is not affected, yet his interest, which remains the same, is only a right to redeem. By the foreclosure and sale and the *master's deed thereunder* [Italics supplied.], the legal title becomes vested in the grantee in such deed, and leaves nothing in the mortgagor, or his grantees, who are not parties to the proceeding, except the right to redeem in equity. Inasmuch as the interest of the grantee of the mortgagor, who is not made a party to the foreclosure, is merely a right of redemption, the right which he has is an equitable one, and must be asserted in a court of equity." Walker v. Warner, 179 Ill. 16, 24, 53 N.E. 594 (1899). [This passage appears with changed language in 53 N.E. at p. 597.] That court merely says that after the master's deed issued there was nothing left for plaintiff except to redeem in equity. It does not say that before the expiration of twelve months there is not a right to redeem under the statute.

12 "Any defendant, his heirs, executors, administrators, assigns, *or any person interested in the premises, through or under the defendant,* may . . . within twelve months from said sale, redeem the real estate so sold. . . . "[Ital. supplied.] Ill. Rev. Stat., 1939, Ch. 77, § 18.

"If such redemption is not made, *any decree or judgment creditor* . . . may, after the expiration of twelve months and within fifteen months after the sale . . . redeem the premises in the following manner. . . . "[Ital. supplied.] Ill. Rev. Stat., 1939, Ch. 77, § 20.

13 In Ogden v. Stevens, 241 Ill. 556, 89 N.E. 741, 132 Am. St. Rep. 237 (1909) the defendant frequently promised the plaintiff to accept money and permit a redemption both before and after the master's deed was issued to defendant. Plaintiff's predecessor had been a party to the foreclosure proceeding. Plaintiff also made repeated efforts to close the transaction and the defendant was either not at home or was too ill to attend to business affairs. In Palmer v. Douglas, 107 Ill. 204 (1883), the purchaser at the foreclosure sale was the family physician and confidential adviser of the plaintiff, an illiterate old man, and he repeatedly assured the latter that he would permit redemption of the property. Woodworth

most of the other authorities used by the court to support the view that a junior mortgagee may be given the right to redeem from a first mortgage sale after the expiration of the period of redemption where he was not served with process are cases in which *redemption in equity* was allowed.[14] The two other cases cited for this proposition also may be distinguished and are not actually authority for the court's contention.[15]

Apparently the instant case is out of line with precedent. It lacks authority for three of its fundamental premises: (1) that one not a party to the foreclosure is not entitled to statutory redemption; (2) that making the junior mortgagee an "unknown party" through a false affidavit is such fraud as to justify a statutory redemption after the expiration of the statutory period; (3) that a junior mortgagee may have statutory redemption after the statutory period has elapsed where he was not served with process in the senior mortgage foreclosure proceeding. Yet the decision, based on the fraud admitted by the motion to dismiss, is not without logic and the result is equitable. It is true that a junior mortgagee, not served with process, is protected by his right of redemption in equity. It is also true that one not a party to the foreclosure may exercise a statutory right of redemption within the statuory period. Nevertheless, where the statutory period has in fact passed before the junior mortgagee had knowledge of the forclosure sale, as was the case here, and where this was caused by the defendants' falsely describing such junior mortgagee as an "unknown owner", it cannot be denied that his rights were adversely affected as a result of the defendants' conduct. As a result of this conduct, the junior mortgagee would have to pay approximately $41,000 more to redeem, the difference between the amounts required for statutory and equitable redemption. To require this of him would be to allow those guilty of fraud (as the court here insists) to force an election of alternate remedies most beneficial to their interests. The essential distinction between the case at bar and the ordinary case of equitable redemption is this: in ordinary equitable redemption, the redemptioner is omitted from the foreclosure proceeding

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v. Sandin, 371 Ill. 302, 20 N.E. (2nd) 603 (1939) merely indorsed the holdings of Ogden v. Stevens, although, as the instant court pointed out, the facts were not sufficient in the Woodworth case to justify statutory redemption after the statutory period had elapsed.

[14] Bridgeport Savings Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688 (1859); Thompson v. Heywood, 129 Mass. 401 (1880), in which the plaintiff prayed that defendant be ordered to assign the first mortgage to the plaintiff upon the plaintiff paying what, if anything, might be due thereon. In Hodgen v. Guttery, 58 Ill. 431 (1871), the court is talking of redemption in equity and not statutory redemption.

[15] Huxley v. Rice, 40 Mich. 73 (1879) involved a violation of an agreement between the mortgagor and the plaintiff, the foreclosing mortgagee having had knowledge of the agreement. Empire City Savings Bank v. Silleck, 98 App. Div. 139, 90 N.Y.S. 561 (1883), was a suit instituted by a purchaser at a foreclosure sale who wished to be relieved from completing his bid because he would not receive a perfect title due to a jurisdictional defect in the service of process on the second mortgagee.

through a mistake or oversight; while in the present case the redemptioner was not made a party because of the fraudulent conduct, admitted by the pleadings, of the parties to the foreclosure proceeding.[16]

R. B. Cross

PATENTS—INFRINGEMENT—DOES SUPERSEDEAS BOND FURNISHED BY INFRINGER FREE ADJUDGED INFRINGING ARTICLES IN HANDS OF INFRINGER'S VENDEE. —The United States Circuit Court for the Seventh Circuit, in *Wagner Sign Service, Inc.* v. *Midwest News Reel Theatres*,[1] has determined for the first time the question of the effect of a supersedeas bond, furnished on appeal by an infringer of a patent pursuant to Rule 73(d) of the Federal Rules of Civil Procedure,[2] to stay a decree obtained against him by the owner of the patent for an injunction and for an accounting for damages and profits arising from the infringement. It was there held that such bond is equivalent to satisfaction of the decree, at least to the extent required to bar a subsequent recovery by the patentee against one to whom the infringer sells an article or machine adjudged to infringe, and who is but a mere user of such article or machine.

The plaintiff, owner of and manufacturer under a patent covering a particular type of theatre sign, had brought the usual infringement suit in equity against a competing manufacturer, hereinafter called "Adler," and had obtained in the district court an order in customary form restraining further infringement and for an accounting for damages and profits. Adler appealed and obtained a stay of the order, furnishing a supersedeas bond in compliance with Rule 73(d) of the Federal Rules of Civil Procedure. While the appeal was pending, the defendant in the instant case, an operator of a number of news reel theatres, purchased from Adler, with full knowledge of the previous litigation, a sign of the type adjudged to infringe plaintiff's patent. Subsequently, the order appealed from was affirmed in the respects material here, and the cause was referred to a Special Master or a report on the accounting for profits and damages.[3] This latter proceeding is still pending. The plaintiff then brought the instant suit and obtained in the District Court a preliminary injunction restraining the defendant from using the in-

[16] The motion to dismiss the complaint admitted for the purpose of this decision, that the plaintiff was deliberately omitted. Upon an answer denying such allegation the question may be differently decided.

[1] 112 F.(2d) 264, 49 U.S.P.Q. 287 (1941).

[2] Rule 73(d). 28 U.S.C.A. following § 723(c). This rule provides in part:

> "Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award."

[3] Adler Sign Letter Co. v. Wagner Sign Service Inc.; Wagner Sign Service Inc. v. Ben Adler Signs, Inc., 112 F.(2d) 264, 45 U.S.P.Q. 387 (1940).

fringing sign, which had already been installed on the marquee of one of defendant's theatres. The Circuit Court of Appeals, reversing the order of the district court, held that the injunction had been improvidently granted, on the grounds that defendant was but a mere user of the sign; the plaintiff, in its successful suit against Adler, the manufacturer, had already recovered for damages and profits including those incidental to the sale of the sign in question; and the supersedeas bond furnished by Adler assured the satisfaction of whatever judgment would be rendered on the then pending accounting proceeding before the Special Master. There was no showing by the plaintiff that the amount of the bond was not sufficient to cover this particular sale in addition to others.

The decision can be best considered by a treatment, preliminarily, of the principles governing the liability of a purchaser from an adjudged infringer, and secondly, of the effect of the supersedeas bond as "satisfaction" of the recovery to be obtained by the plaintiff against Adler in the previous litigation.

A number of earlier cases specifically treat the first question, and generally support the conclusion that recovery of full compensation by the patentee against the infringer frees the use of adjudged infringing devices in the hands of a purchaser from the infringer. However, a large part of the opinion of the court and of the briefs of both parties was devoted to a discussion of an apparent conflict in the decisions including and following the decision of the United States Supreme Court in 1884 in *Birdsell* v. *Shaliol*,[4] although there is in fact a certain unanimity among the cases antedating the Birdsell case. In that case, a patentee, who had earlier recovered a judgment against a manufacturer and vendor of infringing clover-hulling machines, was permitted to recover against a purchaser of one such machine from the infringer-vendor. Significant are the facts that the recovery against the infringer-vendor was for one dollar, as nominal damages, which was paid, and the immediately subsequent insolvency of the infringer-vendor.

In the light of a recovery which was tantamount to no recovery in fact, the Supreme Court used certain broad language concerning the rights of similarly situated parties, and in the course of the opinion discussed the analogy of the case to that of a case in conversion or trespass, where an owner has been deprived of a chattel by two other persons, neither of whom has fully compensated the owner for his loss, the court remarking that in a case of that kind the judgment must be satisfied before title to the chattel can be said to have passed to the converter. As will be observed, the analogy is not perfect, for there is in a case of patent infringement no usurpation or passing of title to a chattel as such. On the basis of the foregoing, *Birdsell* v. *Shaliol* can stand only for the proposition that where a patentee has recovered but nominal damages from an infringing manufacturer, he is not barred from pursuing his remedy against a purchaser from that manufacturer.[5]

[4] 112 U.S. 485, 5 S.Ct. 244, 28 L.Ed. 768 (1884).

[5] See Blake v. Greenwood Cemetery, 16 F.676 (1883).

A number of important factors enter into a proper consideration of the rights of a patentee against purchasers from an infringing manufacturer. The most significant of these factors are: first, the extent of the patentee's first recovery; and, second, the character of the conduct of the purchasers with respect to the devices adjudged to infringe. Hence, if the first recovery amounts to a full compensation and includes damages and profits and other consequences of the sales by the manufacturer and of the uses by the purchasers, the patentee has obtained a complete remedy, for, as stated in *Perrigo* v. *Spaulding*,[6] the patentee is then in the same position as he would have been had he made and sold the device himself, and it is axiomatic that a patentee who makes an unrestricted sale of a device covered by his patent unequivocally frees that device from the patent. Other cases preceding *Birdsell* v. *Shaliol* are of similar import,[7] as are a number of decisions subsequent to the Birdsell case.[8]

Certain cases decided subsequently to the Birdsell case are to the effect that a recovery of damages from the manufacturer only will not bar a recovery of profits from users who purchase from the manufacturer.[9] But, as will be observed, the inference is compelled that if the recovery against the manufacturer includes the total amount of the

[6] 19 Fed. Cas. 260 (1876).

[7] Spaulding v. Page, 22 Fed. Cas. 892 (1871); Gilbert & Barker Mfg. Co. v. Bussing, 10 Fed. Cas. 348 (1875); Booth v. Seevers, 3 Fed. Cas. 888 (1881); Allis v. Stowell, 16 F. 783 (1883); Steam Stone Cutter Co. v. Windsor Mfg. Co. 22 Fed. Cas. 1169 (1879); Steam Stone Cutter Co. v. Sheldons, 21 F. 875 (1884); Sickels v. Borden, 22 Fed. Cas. 67 (1856); Emerson v. Simm, 8 Fed. Cas. 640 (1873). Birdsell v. Shaliol overruled none of these decisions.

[8] In the following cases, the use of the device was freed upon the patentee's recovery against the manufacturer, this recovery being measured in various forms, as will be indicated:

Actual damages: Commercial Acetylene Co. v. Portable Lighting Co., 152 F. 642 (1906); Electric Gas Lighting Co. v. Wollensak, 70 F. 790 (1895); Sutton, Steele & Steele v. Gulf Smokeless Coal Co., 6 F. Supp. 419 (1933), modified on other grounds in 77 F.(2d) 439 (1935).

Fixed royalty or reasonable license fee: Stutz v. Armstrong, 25 F. 147 1885; Ergy Register Co. v. Standard Register Co., 23 F.(2d) 438 (1928); Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co., 95 F.(2d) 978 (1937); United States Frumentum Co. v. Lauhoff, 216 F. 610 (1914).

Profits and damages: Stebler v. Riverside Heights Orange Growers' Ass'n, 214 F. 550 (1914); Pomona Fruit Growers' Exchange v. Stebler, 241 F. 123 (1917); Panoualias v. National Equipment Co., 269 F. 630 (1920).

[9] United States Printing Co. v. American Playing-Card Co., 70 F. 50 (1895); Thompson v. American Bank Note Co., 35 F. 203 (1888); Philadelphia Trust, Safe Dep. & Ins. Co. v. Edison Electric Light Co., 65 F. 551 (1895); DeLaski & Thropp Circular Woven Tire Co. v. Empire Rubber & Tire Co., 239 F. 139 (1916); Dowagiac Mfg. Co. v. Deere & Webber Co., 284 F. 331 (1922); Hazeltine Corp. v. Atwater-Kent Mfg. Co., 34 F(2d) 50 (1929); Cf. Kryptok Co. v. Stead Lens Co., 190 F. 767 (1911); Wilson v. Union Tool Co., 265 F. 669 (1920), affirmed on certiorari, 259 U.S. 107, 42 S. Ct. 427, 66 L.Ed. 848 (1922); Sherman, Clay & Co. v. Searchlight Horn Co., 225 F. 497 (1915); Wagner v. Meccano, Ltd., 239 F. 901 (1917); Meccano, Ltd. v. John Wanamaker, New York, 241 F. 133 (1917), where the suits were against *retail* purchasers, who stood to profit by retailing the articles adjudged to infringe.

profits, the user will be free from liability. A few decisions rather pointedly conclude that recovery against the manufacturer has no effect on subsequent recovery by the patentee against the user.[10] Of these, *Directoplate Corporation* v. *Huebner-Bleistein Patents Co.*,[11] relied upon by the plaintiff, received the consideration of the court and was disposed of on the ground that no supersedeas was involved.[12]

Van Epps v. *International Paper Co.*[13] stands alone in its holding that despite a prior judgment and satisfaction thereof, from the infringing manufacturer, for damages measured by plaintiff's established license fee, such plaintiff may proceed against a user for damages measured by the same license fee. In short, the Van Epps case stands for double recovery for the patentee.[14] However, since this case is unique in its holding, it cannot be seriously considered.

On the basis of the considered cases it may be concluded that the cases decided before and after *Birdsell* v. *Shaliol,* with the exception of the Van Epps case, can be reasonably harmonized with each other and with the decision in the Birdsell case. Also that, in factual situations showing full compensation of the patentee, and use by the infringer's vendee which use does not interfere with the patentee's monopoly, the purchaser from the infringer is not liable.[15]

[10] Directoplate Corporation v. Huebner-Bleistein Patents Co., 44 F.(2d) 783, 7 U.S.P.Q. 61 (1930); New York Filter Co. v. Schwarzwalder, 58 F. 577 (1893); Asbestos Shingle & Sheathing Co. v. Johns-Manville Co., 189 F. 611 (1911); Westinghouse Electric & Mfg. Co. v. Mutual Life Ins. Co., 129 F. 213 (1904); Tuttle v. Matthews, 28 F. 98 (1886); Compare Kelly v. Ypsilanti Dress-Stay Mfg. Co., 44 F. 19 (1890); and Allington & Curtis Mfg. Co. v. Booth, 78 F. 878 (1897); with Maytag Co. v. Meadows Mfg. Co., 35 F.(2d) 403 (1929).

[11] 44 F.(2d) 783, 7 U.S.P.Q. 61 (1930).

[12] The Directoplate case, like others of its type, became concerned with the particular question under consideration upon a suit by the losing infringing manufacturer against the successful patentee for an injunction restraining the latter from prosecuting a number of suits against the manufacturer's customers. Thus, it may be argued that because of the unfavorable position of the plaintiff the issue was presented in unfavorable surroundings.

[13] 124 F. 542 (1903).

[14] In a similar aspect, defendant successfully argued that if plaintiff were allowed to recover against Adler here, then defendant, having thus suffered damages because of breach of the warranty of the right to use necessarily implied in the sale of the sign by Adler to defendant, could recover over from Adler, and Adler would suffer double liability. See Westinghouse Electric Mfg. Co. v. Stanley Electric & Mfg. Co., 121 F. 101 (1903); and General Chemical Co. v. Standard Wholesale Phosphate & Acid Works, Inc., 101 F.(2) 178 (1939). See also, infra, note 16.

[15] It is to be noted that what is approved here is the denial, in proper cases, of immediate *recovery* by a patentee in a suit against the infringer's vendee. It may be conceded that the patentee's *abstract right to sue* is not affected in all cases. Such cases are those where the accounting by the infringer is not completed (Directoplate Corporation v. Huebner-Bleistein Patents Co., Kelley v. Ypsilanti Dress-Stay Mfg. Co., Allington & Curtis Mfg. Co. v. Booth, and Maytag Co. v. Meadows Mfg. Co., supra, note 10), for it cannot be presently determined whether the patentee is to be fully compensated by the manufacturer and it may be necessary for the patentee to have his case at least filed against the purchaser. See also note 18, infra.

The importance of the requisite elements mentioned in the preceding paragraph is brought out in the facts of the instant case, and an analysis thereof will illustrate the soundness of the decision apart from authority. The plaintiff's business was solely that of a manufacturer and vendor of advertising signs, and although the principal venture of the business was in the furnishing of theatre signs, plaintiff operated no theatres. A sign of the type considered here is a static thing and the use of such display by the defendant was not attended with factors incident to competition with plaintiff. There was no trafficking in infringing signs, nor was there any resale or re-use, actual or threatened, of the sign in controversy.[16] The fact that defendant's theatre attracted patrons in huge numbers was not traceable to the infringing sign. As a matter of fact, that particular theatre had drawn equally large audiences before the infringing sign was installed, and it is seriously doubted whether a single patron possessed an effective like or dislike for any particular kind of sign. In any event, plaintiff failed to show a single lost sale, and its attempt to show that the conduct of the defendent and of Adler resulted in damage to the plaintiff in that such conduct indicated to the public that plaintiff's patent was being and could continue to be ignored in a "notorious, flagrant and challenging" manner, was rejected by the court as speculative and as insufficient reason to grant plaintiff either pecuniary or injunctive relief.

Having applied the principles of the discussed cases in the instant situation, the consideration of the supersedeas bond under Rule 73(d) becomes but a recognition of the terms and spirit of the rule. The language of the rule is plain: *"The bond shall be conditioned for the satisfaction of the judgment in full."* Plaintiff urged that the only effect of the supersedeas bond was to save Adler from the pains of punishment for contempt if the infringing device was sold pending appeal. This position the court held untenable, for although a supersedeas without bond might have this limited effect, the presence of the bond is an assurance that plaintiff, if successful (as he was) against Adler, would be fully compensated for all damages and profits occasioned by Adler's manufacture and sale of infringing signs until the time of the final accounting. Moreover, the sale of the sign to the defendant was, in the nature of things, made with the sanction of the court in the Adler case, for the stay on appeal in effect gave Adler the right to make the sale, which carried with it the right of use by a purchaser. In this respect it is to be noted that the purchase by defendant pending the appeal, during which the injunction was stayed by the supersedeas bond, was not materially different from a purchase made before the Adler litigation had even begun. And this also effectively disposes of plaintiff's contention that the position of the court on this point amounted to construing the supersedeas bond as a license to Adler to make and sell infringing devices, for, as has already been pointed out, the Adler in-

[16] Compare those cases, supra, note 9, where the patentee was permitted recovery because the defendant-purchasers were retailers and stood to increase their own profits and the patentee's damages.

junction was superseded and the situation was temporarily that in which, practicably speaking, no injunction had issued.[17]

In a final aspect of the case, plaintiff made a conditional offer to waive damages against Adler as to the sign in controversy if it could have its recovery against defendant here. This offer was rejected on the ground that plaintiff had made an election to obtain a decree against Adler for damages and profits arising from all sales, including the sale to defendant, and that the record disclosed only such decree and no other.[18]

Upon well reasoned principles and the most persuasive authority, the rule laid down by the court cannot be seriously disputed. The doctrine that recovery of full compensation by a patentee against an infringing manufacturer frees the use of infringing articles in the hands of a purchaser from that manufacturer, is salutary and practicable and is capable of intelligent and just application in those cases in which the use of the device by infringer's vendee is a mere use as distinguished from a use which proximately provides the user with a source of profit or which seriously interferes with the business of the patentee. The establishment of the effect of the supersedeas bond as the equivalent of, or as assuring, the satisfaction of the judgment or decree against the manufacturing infringer seems plainly within the intent of Rule 73(d). Moreover, the attributing of this effect to the supersedeas bond renders unimportant the broad effect given to such cases as *Birdsell* v. *Shaliol*, for now the patentee receives the equivalent of full satisfaction.

H. M. KNOTH

WORKMEN'S COMPENSATION—FULL FAITH AND CREDIT—APPLICATION OF THE WORKMEN'S COMPENSATION LAW OF THE FORUM WHERE THE INJURY IS SUSTAINED THEREIN AND THE CONTRACT OF HIRE IS CONSUMMATED IN A FOREIGN STATE.—The sole circumstance that an industrial accident occurs in Illinois does not constitute a sufficient interest to warrant the application of the Illinois Workmen's Compensation Act where the contract of employment was consummated in a foreign state. The effect of the recent decision in the case of *Miller* v. *Yellow Cab Company*[1] is to reaffirm

[17] Whatever the nature of the effect of the supersedeas, the court found it unnecessary to decide, and the point is believed immaterial here. Certain it is that the stay did not constitute a license. Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 F. 545 (1896); Meccano, Ltd. v. John Wanamaker, 241 F. 133 (1917); Wagner et al v. Meccano, Ltd., 239 F. 901 (1917).

[18] The court admitted that if, in the accounting proceeding pending in the Adler litigation, the plaintiff succeeded in its waiver or otherwise failed to be compensated by Adler for damages and profits incidental to the particular sign in question, a different situation would be presented. However, in view of the conclusion that the supersedeas bond assured full satisfaction, the question was at present immaterial. Here again it will be seen that the patentee's abstract right to maintain the suit cannot always be denied; although, it is apparent that his recovery against the infringer's vendee should be held in abeyance at least until it is determined whether the infringer will be called to account. See also note 15, supra.

[1] 308 Ill. App. 217, 31 N.E. (2d) 406 (1941).

this fact, and further, to declare that there is no Illinois public policy which compels the application of its own compensation law under these circumstances.

The plaintiff in the instant case was an employee of Sears Roebuck & Co., a New York Corporation. While a resident of Texas he made the contract of employment in that state, to be fully performed there, whereby he undertook to manage the store of his employer at San Antonio, Texas. Both the employer and employee were operating under and subject to the provisions of the Texas Workmen's Compensation Law. In addition, the employer was also operating under the Illinois compensation law with respect to its Illinois operations and the defendant was likewise subject to the Illinois compensation law. The plaintiff came to Chicago intending to consult with officials of his company concerning matters dealing with the management of the store, and while a passenger in a taxi of the defendant corporation, a collision occurred between the taxi and another automobile resulting in injuries to the plaintiff. Admittedly, the accident arose out of and in the course of the plaintiff's employment.

The Texas compensation law specifically provided for its extra-territorial application,[2] this being a valid provision of such a statute,[3] and accordingly, compensation was awarded to the plaintiff upon his filing a claim under the Texas law. Subsequently, he brought a civil action against the Yellow Cab Company in the Circuit Court of Cook County, Illinois, alleging the negligent operation of the taxi. The defendant's answer, in addition to other defenses, set up the fact that Sears Roebuck & Co. was operating under the provisions of the Illinois compensation act and by operation of that law all employees of the corporation, who had not elected not to be bound, were also subject to the same law. It was set forth that the plaintiff had a right to obtain compensation under the Illinois statute because the injury was sustained in this state. This statute provides that when an employee is injured under circum-

2 Title 130, Vernon's Texas Statutes, 1936 Art. 8306, § 19. A majority of the workmen's compensation laws specifically provide for their extra-territorial application, while other statutes, by judicial construction, have been given this effect. However, such extra-state effect is subjected in many instances to qualifications and restrictions which make it essential to analyze the statutes and the judicial decisions, in order to determine the extent to which a particular state applies its statute beyond its territorial jurisdiction.

3 Beall Bros. Supply Co. v. Ind. Com., 341 Ill. 193, 173 N.E. 64 (1930); Johnston v. Ind. Com., 352 Ill. 74, 185 N.E. 191 (1933); Hagenback v. Leppert, 66 Ind. App. 261, 117 N.E. 531 (1917); Rounsaville v. Central Railway Co., 87 N.J.L. 371, 94 Atl. 392 (1915); Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372 (1915); Post v. Burger, 216 N.Y. 544, 111 N.E. 351 (1916); Krekelberg v. Floyd Co., 166 Minn. 163, 207 N.W. 193 (1926); Gulf Casualty Co. v. Fields, 107 S.W.(2d) 661 (1937); Maryland Casualty Co. v. Brown, 110 S.W.(2d) 130 (1937); Sloan v. Appalachian Power Co., 27 F. Supp. 108 (1939). The theory of extra-territorial application is that when the contract of hire is consummated within the state, the incident of compensation benefits becomes annexed to the contract and operates as a material provision of that contract, regardless of the time or place of performance.

stances creating liability for damages on the part of a third party, such third party also being subject to the act, then the injured employee's right of action is transferred to his employer and damages are limited to the payments which the employer is required to make under the compensation act.[4] As this section of the law has been construed to bar an action by the employee against the tort feasor,[5] the defendant set up this disability in defense. Judgment for the defendant was rendered on the pleadings and an appeal was prosecuted to the appellate court which reversed the ruling of the trial court and remanded the case with directions, holding that the plaintiff was not subject to the Illinois Workmen's Compensation Act, and that he had a right of action against the defendant under the Texas law which permits an injured employee to sue a negligent party causing the injury.[6]

There is some contrariety in the decisions as to whether the local law of the forum, which is also the place of the injury, or whether the lex loci contractus should be applied under circumstances similar to those prevailing in this case,[7] the majority of the jurisdictions holding that the latter law is applicable. There is authority for the proposition that a competent court in the state where the contract of hire was concluded, having in personam jurisdiction, could enjoin an employee who proceeds with a claim for compensation under the laws of the foreign state.[8] Furthermore, the United States Supreme Court in the case of *Bradford Electric Light Co.* v. *Clapper*,[9] has definitely ruled that where a state compensation law provides for the employee's exclusive remedy and for its extra-territorial application, a foreign state must extend full faith and credit to that law, despite the occurrence of the wrong in the foreign state. In the case of *Cole* v. *Industrial Commission*,[10] the court held that the Illinois Industrial Commission had no jurisdiction in a case involving

[4] Ill. Rev. Stat. 1939, Ch. 48, Sec. 166. This portion of the Illinois statute is unique and no similar provision, whereby an injured employee's right of action against a third party also operating under the act is transferred to his employer and recovery is limited to the payments prescribed by the act, will be found in any other workmen's compentation law.

[5] Parker v. Alton R. Co., 295 Ill. App. 60, 14 N.E.(2d) 665 (1938); Brennan Const. Co. v. Blair, 261 Ill. App. 9 (1931); Goldsmith v. Payne, 300 Ill. 119, 133 N.E. 52 (1921); McNaught v. Hines, 300 Ill. 167, 133 N.E. 53 (1921); Joseph Schlitz Brewing Co. v. Chicago Rys. Co., 307 Ill. 322, 138 N.E. 658 (1923).

[6] Title 130, Vernon's Texas Statutes, 1936 Art. 8307, Sec. 6a.

[7] Hall v. Industrial Commission, 77 Colo. 338, 235 P. 1073 (1925); Cole v. Industrial Commission, 353 Ill. 415, 187 N.E. 520 (1933); Barnhart v. American Concrete Steel Co., 227 N.Y. 531, 125 N.E. 675 (1920); Proper v. Polley, 233 App. Div. 631, 253 N.Y.S. 530 (1931). These cases hold that the compensation law of the forum does not apply to an injury within the state, where the employment was in another state. The contrary view is held in the following cases: Pacific Employers Inc. Co. v. Ind. Acci. Com., 306 U.S. 493, 59 S. Ct. 629, 83 L.Ed. 940 (1939); Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439, 53 S. Ct. 663, 77 L.Ed. 1307 (1933); Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516 (1921).

[8] Weiderhoff v. Neal, 6 F. Supp. 798 (1934); Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 52 S. Ct. 571, 76 L.Ed. 1026 (1932).

[9] 286 U.S. 145, 52 S. Ct. 571, 76 L.Ed. 1026 (1932).

[10] 353 Ill. 415, 187 N.E. 520 (1933).

an injury sustained by an Indiana resident, employed under an Indiana resident, employed under an Indiana contract of hire, where the employee was injured while temporarily working in Illinois. The court clearly stated that full faith and credit must be given the Indiana statute, which provided for its extra-state application, and relied on the authority of the Clapper case for its decision. This was the first decision of the Illinois court with respect to this particular problem and no occasion arose to re-examine this exact question until the decision in the case of *Biddy* v. *Blue Bird Air Service*,[11] where similar circumstances produced a like result. The instant case reasserts that the Illinois Workmen's Compensation Act is not applicable where the lex loci contractus provides for extra-territorial effect, and the employee is but temporarily in this state when the injury is sustained.

The requirement that full faith and credit be extended to a foreign statute is subject to the limitation that if there is extant a public policy in opposition to the foreign statute, then the forum is not compelled to subordinate its own law. Some states have adopted a public policy which requires the application of their own compensation laws when an employee is injured within the territorial jurisdiction of the state, even though the law of the state where the employment contract was made provides for extra-state coverage. In the case of the *Pacific Employers Insurance Co.* v. *Industrial Commission*,[12] wherein a Massachusetts resident, employed under a Massachusetts contract, sustained an injury while temporarily in California, the United States Supreme Court sustained the judgment of the California court in applying the California compensation law. This decision was predicated on the declared public policy of California to apply its compensation law where an employee is injured in that state, regardless of the lex loci contractus. This declaration of public policy was promulgated by the California court in construing its own constitution and statute which specifically provided that its compensation law applied to all injuries which occur within its borders, despite any contract between the employer and the employee which provides to the contrary.[13] Other states have incorporated similar provisions in their statutes.[14] Thus, there is no conflict in the opinions

[11] 374 Ill. 506, 30 N.E.(2d) 14 (1940).

[12] 306 U.S. 493, 59 S. Ct. 629, 83 L.Ed. 940 (1939).

[13] California Construction of 1879, Art. XX, § 21, vests the legislature with plenary power "to create and enforce a complete system of workmen's compensation," including "adequate provisions for the comfort, health and safety and general welfare . . ." § 27 (a) of the California Workmen's Compensation, Insurance and Safety Act, Cal. Gen. Laws (Deering 1931) Act 4749, provides that "No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this act."

[14] The Delaware Compensation Law provides, "This Chapter shall be called and cited as 'The Delaware Workmen's Compensation Law of 1917' and shall apply to all accidents occurring within this State, irrespective of the place where the contract of hiring was made, renewed or extended. . . ." Missouri provides, "This chapter shall apply to all injuries received in this state, regardless of where the contract of employment was made. . . ." Nevada has a provision peculiar to that state wherein it is provided that "any employer of labor in the State of

expressed in the California case and the Clapper case, because in the latter case neither the New Hampshire court nor the New Hampshire statute declared the existence of a public policy requiring the application of its own law.

A refusal to extend full faith and credit to a compensation law providing extra-territorial effect, on the grounds of an opposing public policy seems to be an unreasonable expansion of that doctrine, particularly in those cases wherein the only real interest of the forum is the fact of the accident occurring within its territory. Additional and more substantial contacts in a particular case would undoubtedly constitute a rational basis for applying the lex fori.

All of the cases decided by the Illinois court on this point have involved circumstances wherein the employee was a non-resident and but temporarily in Illinois when his injury was sustained. The instant case invites consideration as to what the attitude of the Illinois court would be if there were additional contacts enlarging the interest of the state, though the contract of hire was made elsewhere. A strict compliance with the rule that the lex loci contractus attaches where an injury is sustained in this state certainly would not produce a salutary situation. Assuming the additional factor that the employee is domiciled in Illinois, does it seem probable that the Illinois Court would refuse to apply its compensation act and thereby compel a resident of this state to go to a distant state in order to enforce a claim for compensation? Other factors which would enlarge the governmental interest of this state establishing a sufficient basis for the application of the Illinois law would be the fact that the contract of employment was to be fully performed here, and that the particular employment was incidental to and associated with a business localized in Illinois. It would seen that any one of these factors, or a combination of them, coupled with the fact that the accident occurred here, might well justify the acceptance of jurisdiction. Particularly is this true in the case of an Illinois resident when consideration is given the expressed purpose of the act as set forth in the title.[15] It will be observed that the act purports to apply specifically

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Nevada and any employee thereof, whether hired in or out of the state and whose duties may be partially or wholly out of the state, may, by their joint election, elect to come under the provisions of this act in the manner following: . . . After such joint election is made, any employee who receives personal injury by accident arising out of and in the course of such employment shall be entitled to receive compensation according to the provisions of this act, even though he was hired outside of this state and received such injury outside of this state." The New Hampshire Workmen's Compensation Law formerly contained a provision that its law applied to workmen within that state irrespective of the place where the contract of hire was made, but by amendment effective July 1, 1939, this section of the law was omitted.

[15] "An Act to promote the general welfare of the people of this State by providing compensation for accidental injuries or death suffered in the course of employment within this State, and without this State where the contract of employment is made within this State; providing for the enforcement and administering thereof. . . ." Laws 1925, p. 378. (Preamble of Workmen's Compensation Act, Ill. Rev. Stat. 1939, Ch. 48, §§ 138-186.)

to the people of the state of Illinois, and the granting of compensation, despite the fact that the contract of hire was entered into in a foreign state, would not violate the full faith and credit clause of the Constitution because the act can be rationally construed as an expression of public policy with respect to injuries sustained by its residents while in the course of their employment.

The courts of other states have refused to apply their compensation laws, despite an extra-territorial provision, and have ruled that the lex loci contractus does not apply when the employment outside the state is not incidental to operations conducted within the state, or where the contract is to be fully performed without the state.[16] Thus, it is readily apparent that an impassé would develop whereby an injured employee would be denied a remedy under the law of the state where the contract was made, and he would likewise be denied a remedy under the Illinois law, unless rational limitations were placed upon application of the rule announced in the instant case. The lack of uniformity in extra-territorial provisions, many states having limitations and restrictions which are peculiar to their own statutes,[17] is a factor to be considered against a

[16] Cameron v. Ellis Construction Co., 252 N.Y. 394, 169 N.E. 622 (1930). This case involved an employment contract made in New York with performance to be made in Canada by the employee, his work being incidental to a road construction job being performed in New York. The court, in refusing to apply its compensation law, said, "Nothing in the statute suggests that the state of New York has attempted to stretch forth its arm to draw within the scope of its own regulations the relations of employer and employee in work conducted beyond its borders. Hazardous employment here is regulated by the Workmen's Compensation Law; hazardous employment elsewhere, though connected with a business conducted here, does not come within its scope. . . .

"When the course of employment requires the workman to perform work beyond the borders of the state, a close question may at times be presented as to whether the employment itself is located here. Determination of that question may at times depend upon the relative weight to be given under all the circumstances to opposing considerations. The facts in each case, rather than juristic concepts, will govern such determination. Occasional transitory work beyond the state may reasonably be said to be work performed in the course of employment here; employment confined to work at a fixed place in another state is not employment within the state, for this state is concerned only remotely, if at all, with the conditions of such employment."

[17] There is a seemingly inexplicable variance in the extra-territorial provisions of the compensation acts of those states which have specifically provided for such application. The statutes of Colorado, Louisiana, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Wisconsin, and Wyoming make no specific mention of the extra-territorial application of their respective laws, but the courts in all of these states have determined that such effect shall be given to their respective statutes under the particular circumstances of the individual cases presented for adjudication. Those states which have extra-territorial statutes may be classified satisfactorily into several groups, but some statutes do not bear classification because of their unique character. In this category are Maryland, Massachusetts, and Oregon. The statutes of Connecticut, Illinois, Indiana, Idaho, Iowa, Maine, Nebraska, Ohio, South Dakota, Utah, and Vermont provide that their laws shall apply to injuries sustained outside the state where the contract of hire was made within the state, without any specific limitation on their application. Alabama, Kansas,

blind adherence to the rule which requires enforcement of the lex loci contractus. The restrictions, which have been referred to, will provoke numerous factual problems in the process of determining whether the extra-territorial provision of a law will be enforced by an enacting state in a particular case. It is readily conceivable that if a decision adverse to the employee is rendered in that state, a sufficient period of time would have elapsed to prevent the employee's making claim in Illinois because of the Illinois statute of limitations, which requires the claim to be filed with the Industrial Commission within one year after the date of the injury.

In the last analysis, it is desirable that careful consideration be given the circumstances of each case and if facts are present which create a substantial Illinois interest, then Illinois would be warranted in a refusal to subordinate its own statute. There can be no criticism of the decision in the instant case as it is fundamentally sound in principle, the only danger being the adoption of a policy extending the rule beyond the limited circumstances of the case. L. B. MARSHALL

Kentucky, Missouri, and Tennessee provide for an extra-territorial effect unless the contract of employment otherwise specifically provides. Michigan and California provide that the employee must be a resident of the state, and Florida, Georgia, North Carolina, South Carolina, and Virginia add to this element of residence the requirements that the employer's place of business must be within the state and that the contract was not for services to be performed exclusively outside the state. Delaware, Pennsylvania, and Texas provide for a time limitation within which the injury must be sustained in order for the extra-territorial provision to be operative.